No. 7890

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

WALTER BAER,

Appellant,

v.

ROY J. NORENE, Divisional Director of Immigration, for the District of Oregon,

Appellee.

Upon Appeal from the United States District Court for the District of Oregon.

Brief of Appellee

IRVIN GOODMAN,
Yeon Bldg., Portland, Ore.,
For Appellant.

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STATEMENT OF FACTS

The facts upon which this appeal is based are stated adequately in the stipulation of counsel of record herein (Tr. 33-35). The sole issue of law is also stipulated (Tr. 35), it being whether the crimes of burglary in the second degree, as defined by the laws of Idaho, in the year 1917; knowingly uttering a forged bank check, as defined by the laws of Oregon, in the year 1919; and forgery of an endorsement, as defined by the laws of Oregon, in 1921, are crimes involving moral turpitude within the meaning of Title 8, U.S.C.A., Section 155.

The appellant was convicted of each of these crimes at the respective times and places above stated, and imprisoned for each crime for more than a year. He was arrested and granted a hearing upon a warrant of arrest issued by the Secretary of Labor, after which a warrant of deportation issued. Application was made to the United States District Court for the District of Oregon by the appellant for the issuance of a writ of habeas corpus, in which it was urged that the above-mentioned crimes did not involve moral turpitude. From the District Court's order denying the application for habeas corpus and remanding the appellant to the custody of the appelee, the appellant appeals, assigning as error the Court's holding *that the said crimes above-mentioned involved moral turpitude.*

PERTINENT STATUTES

Title 8, U.S.C.A., Section 155, insofar as applicable here, provides as follows:

> "* * * except as hereinafter provided, any alien who, after February 5, 1917, is sentenced to imprisonment for a term of one year or more because of conviction in this country of a crime involving moral turpitude, committed within five years after the entry of the alien to the United States, *or who is sentenced more than once to such a term of imprisonment because of conviction in this country of any crime involving moral turpitude committed at any time after entry;* * * * shall upon the warrant of the Secretary of Labor be taken into custody and deported. * * * The provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or the judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence, or within thirty days thereafter, due notice having first been given to representatives of the State, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this sub-chapter. * * * In every case where any person is ordered deported from the United States under the provisions of this subchapter, or of any law or treaty, the decision of the Secretary of Labor shall be final." (Feb. 5, 1917, Chap. 29, Sec. 19, 39 St. 889.) (Italics ours.)

Section 8400, Idaho Compiled Statutes, 1919:

> "Every person who enters any house, room, apartment, tenement, ship, warehouse, store, mill, barn, stables, outhouse, or other building, tent, vessel, or

railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary. (R.S. Sec. 7014")

Footnote is as follows: "Hist. (See Cr. and P. '64, Sec. 59), R. S. 7014; Re-en. R. C. ib.; Re-en. C. L. ib."

Section 8401, Idaho Compiled Statutes, 1919:

"Every burglary committed in the nighttime is burglary in the first degree and every burglary committed in the daytime is burglary in the second degree. (R.S. Sec. 7015)"

Footnote is as follows: "Hist. R. S. Sec. 7015; Re-en. R. C. ib.; Re-en. C. L. ib."

Section 14-379, Oregon Code Annotated, 1930:

"If any person shall, with intent to injure or defraud any one, falsely make, alter, forge, or counterfeit any public record whatever, or any certificate, return, or attestation of any clerk, notary public, or other public officer, in relation to any matter wherein such certificate, return or attestation may be received as legal evidence, or any note, certificate, or other evidence of debt issued by any officer of this state, or any county, town, or other municipal or public corporation therein, authorized to issue the same, or any application to purchase state lands or assignment thereof, contract, charter, letters patent, deed, lease, bill of sale, will, testament, bond, writing obligatory, undertaking, letter of attorney, policy of insurance, bill of lading, bill of exchange, promissory note, evidence of debt, or any acceptance of a bill of exchange, indorsement, or assignment of a promissory note, or any warrant, order, or check, or money, or other property, or any receipt for money or other

property, or any acquittance or discharge for money or other property, or any plat, draft, or survey of land; or shall, with such intent, knowingly utter or publish as true or genuine any such false, altered, forged, or counterfeited record, writing, instrument, or matter whatever, such person, upon conviction thereof, shall be punished by imprisonment in the penitentiary for not less than two nor more than twenty years. (L. 1864; D. Sec. 584; D. & L. Sec. 592; H. Sec. 1808; B. & C. Sec. 1858; L. 1907, ch. 126, p. 228; L.O.L. Sec. 1996; O.L. Sec. 1996.)"

POINTS AND AUTHORITIES

Point I.

Moral turpitude is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellowman or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

Ng Sui Wing v. United States (C. C. A. 7, 1931) 46 F. (2d) 755;

In re Henry, 15 Ida. 755; 99 Pac. 1054; 21 L. R. A. (N. S.) 207;

Opinion of Solicitor, Dept. of Labor, 1911;

Words and Phrases (2d series) 444.

Point II.

It is in the intent with which an act is done that moral turpitude inheres, and a crime committed with malicious

or fraudulent intent manifestly involves moral turpitude.

United States ex rel Mongiovi v. Karnuth, District Director of Immigration, (D. C. N. Y. 1929) 30 F. (2d) 825;

United States ex rel Shladzien v. Warden, Eastern State Penitentiary, et al, (D. C. E. D. Pa. 1930) 45 F. (2d) 204;

United States ex rel Meyer v. Day, (C. C. A. 2, 1931), 54 F. (2d) 336;

United States ex rel Miller v. Tuttle, (D. C. Eastern D. La. 1930) 46 F. (2d) 342;

United States ex rel Medich v. Burmaster, Immigration Inspector, (C. C. A. 8, 1928), 24 F. (2d) 57;

United States ex rel Portada v. Day, Immigration Commissioner, (D. C. N. Y., 1926), 16 F. (2d) 328;

United States ex rel Robinson v. Day Commissioner of Immigration, (C. C. A. 2d. 1931) 51 F. (2d) 1022.

Point III.

The crime of burglary in the second degree in Idaho in 1917 included, as an essential element thereof, an intent to commit larceny or some felony and is thus a crime involving moral turpitude.

Sections 8400-8401, *Idaho Comp. Stat.,* 1919;

43 *Harv. Law Review,* 117-119;

Opinion, Solicitor Dept. of Labor, 1911;

United States ex rel Griffo v. McCandless (D. C. Pa. 1928), 28 F. (2d) 287.

Point IV.

The crimes of knowingly uttering a forged check in the State of Oregon in 1919 and forgery of endorsement in Oregon in 1921 included, as essential elements thereof, an intent to defraud and are thus crimes which involve moral turpitude.

Sec. 14-379, *Oregon Code Annotated,* 1930;

United States ex rel Portada v. Day, Immigration Commissioner, (D. C. N. Y., 1926) 16 F. (2d) 328;

Nishimoto v. Nagle, (C. C. A. 9, 1930) 44 F. (2d) 304;

State v. Wheeler, 20 Ore. 192;

United States ex rel Volpe v. Smith Director of Immigration, 289 U. S. 422;

Ex Parte Wilson, 114 U. S. 417;

Robinson v. Day, (C. C. A. 2, 1931) 51 F. (2d) 1022.

ARGUMENT

Moral turpitude is defined as an act of baseness, vileness, or depravity in the private and social duties which a man owes to his fellow-man or to society in general, contrary to the accepted and customary rule of right and duty between man and man.

Appellant contends that the term "moral turpitude" is too vague and indefinite to serve as a workable criterion in deportation cases under the Immigration Act (Point VII, Appellant's brief, p. 10). We concede that the term

has been criticised on this ground, but contend that the definition given it by the courts affords little difficulty in its application at least to the crimes with which we are here concerned. We have examined the article cited by appellant, 43 Harvard Law Review, 117, and have discovered that, while as to such crimes as violation of the National Prohibition Law, manslaughter in some instances, etc., the decisions are not altogether harmonious, the author sets forth a group of crimes about which there is little or no conflict in the decisions. At page 119 of that publication is written the following:

> "Almost all courts have construed the words 'moral turpitude' as embracing every form of stealing. Larceny, embezzlement, *burglary,* receiving stolen property, obtaining money under false pretenses, conspiring to defraud, *issuing checks without funds,* are all crimes involving moral turpitude. * * *" (Italics ours.)

The definition submitted we believe to be a widely accepted one, upon which most of the courts agree. It is extracted verbatim from the case of *Ng Sui Wing v. United States,* supra, and while the crimes involved in that case were those of rape, statutory rape, and so on, the court had no difficulty, under the definition here given, in determining that those crimes involved moral turpitude.

The same definition is found in the case of *In Re Henry,* supra, wherein the Supreme Court of Idaho held larceny to be a crime involving moral turpitude and said:

> "It is a crime per se and is innately wrong and violative of the rights of property and of individuals and

> society. To say that this crime could be committed without involving turpitude and carrying with it moral iniquity would be out of the question. While it is true that the expression 'moral turpitude' is not very accurately and precisely defined and that the point at which an act begins to take on the color of turpitude is not very definitely marked and pointed out, still there can be no doubt in the mind of a man of ordinary intelligence that he has long since passed into the confines of moral turpitude before he completes an act of larceny."

Words and Phrases (2d series), Page 444, states the meaning of the word "turpitude" as follows:

> " 'Turpitude' in its ordinary sense involves the idea of inherent baseness or vileness, shameful wickedness, depravity. In its legal sense it includes everything done contrary to justice, honesty, modesty, or good morals. The word 'moral', which so often precedes the word 'turpitude', does not seem to add anything to the meaning of the term other than that emphasis which often results from tautological expression within the divorce statute. *Holloway v. Holloway,* 55 S. E. 191, 126 Ga. 459, L. R. A. (N. S.) 272, 115 Am. St. Rep. 102, 7 Ann. Cas. 1164; (Citing 5 Words and Phrases, p. 4580; Webster's Dictionary; Black Law Dictionary, and Bouvier's Law Dictionary)."

In an opinion rendered to the Department of Labor, by its Solicitor, in the year 1911, which apparently never was published, the foregoing definitions were considerably amplified, and from a copy of the opinion obtained from the Department of Labor we quote the following:

> "A crime involving moral turpitude may be either

> a felony or misdemeanor existing at common law or created by statute and is an offense: which is malum in se and not merely malum prohibitum; which is actuated by malice or committed with knowledge and intention and not done innocently nor without advertence or reflection; which is so far contrary to moral law, as interpreted by the general moral sense of the community, that the offender is brought into public disgrace, is no longer generally respected, and is deprived of social recognition by good-living persons, but which is not the outcome merely of natural passion, of animal spirits, of infirmity of temper, of weakness of character, of mistaken principles unaccompanied by a vicious motive or a corrupt mind. By way of illustration from the decided cases it was shown that offenses 'involving moral turpitude' included offenses contrary to chastity and decency (as adultery), *or honesty* (*as larceny or burglary*), or veracity (as perjury or forgery), or fair dealing (as breach of trust, extortion or malicious injury), or humane instincts (as acts of cruelty), or the rights of others (as libel or wanton murder), or justice (as bribery), or the public interest, health or morals (as corruption of electoral franchise, selling opium, or keeping a bawdy house), and it was shown that such offenses as trespass, assault and battery, breach of peace, forcible entry and detainer, drunkenness, or harboring fugitives did not 'involve moral turpitude'." (Italics ours.)

The crimes with which we are concerned in this case plainly come within the term "moral turpitude" as is thus defined and illustrated in the opinion of the Solicitor of the Department of Labor, and in the cases hereinafter discussed.

II.

It is in the intent with which an act is done that moral turpitude inheres, and a crime committed with malicious or fraudulent intent manifestly involves moral turpitude.

Whether a particular crime is within the class designated as crimes involving moral turpitude is most surely determined by the character of the intent with which an act is committed. Appellant inquires "Since even manslaughter has been held by the Federal Court not to be a crime involving moral turpitude, how can this court determine that knowingly uttering a forged bank check and forgery of endorsement, committed by a mere youth fifteen or more years ago, involve moral turpitude?" (Point VIII, appellant's brief, p. 12).

The case of *United States ex rel v. Karnuth,* supra, cited by counsel in support of the contention implied in his inquiry just quoted, clearly answers appellant's contention. In that case the court was called upon to determine whether manslaughter in the second degree, as defined by the statutes of New York, was a crime involving moral turpitude. The statute defines the crime of manslaughter in the second degree as a *crime committed without design to effect death.* The court there held that since it did not include "an evil intent or commission of the act wilfully or designedly and it expressly includes an act resulting in death without design to injure or effect death," it did not inherently involve moral turpitude. (Italics ours.)

The court distinguished the *Mongiovi* case from the case of *Weedin v. Yamada,* 4 F. (2d) 455—the latter involving the crime of assault with a deadly weapon—on the ground that the crime of assault with a deadly weapon was committed *with the intent to do bodily harm* and therefore was a crime involving moral turpitude.

We are in thorough accord with the law in the *Mongiovi* case, and believe the distinction made by Judge Hazel between the crime of manslaughter in the *Mongiovi* case and the crime of assault with a deadly weapon in the *Yamada* case a perfectly sound one, resting, as it does, on the intent with which the two crimes were committed.

As said in the case of *United States v. Warden* of *Eastern State Penitentiary;* supra,

> "The moral turpitude of the offense springs from the intent."

So in the case of *United States ex rel Meyer v. Day, supra,* where the relator, an alien, had been convicted of the crimes of robbery and attempt to commit robbery and it was contended that there is a distinction between the attempt and commission of the substantive offense so far as moral turpitude is concerned, the Circuit Court of Appeals for the Second Circuit said:

> "There is no substance in appellant's contention. * * * An attempt involves specific intent to do the substantive crime * * * and if doing the latter discloses moral turpitude, so also does the attempt, *for it is in the intent that the moral turpitude inheres.* * * *" (Italics ours.)

In the case of *United States ex rel Miller v. Tuttle, supra,* where the appellant had been convicted of the offense of encumbering mortgaged property with intent to defraud, and as a defense to the deportation proceedings instituted against him by the Department of Labor contended that such a crime did not involve moral turpitude, the court said:

> "I think counsel is correct in the contention that the court is not bound by the finding of the District Court that the crime involved moral turpitude, for this is a question of law. But the bill of information in this case charged that the defendant executed the second chattel mortgage encumbering mortgaged property *"designing and intending to defraud,"* and to which offense as charged petitioner pleaded guilty. * * * Of course, it would make no difference that payment was afterwards made if at the time he committed the act with a fraudulent purpose. The Department having shown a prima facie case of *conviction of an offense with intention to defraud, which on its face, I think, implies moral turpitude,* the burden was then upon the petitioner to show by sufficient evidence that it did not involve the circumstances denounced by the Act of 1917. * * * I think it hardly necessary to cite authority to support the proposition that *the commission of a fraud involved moral turpitude."* (Italics ours.)

The same principle underlies the holding of the court in the case of *United States ex rel Medich v. Burmaster, supra,* where the alien had entered a plea of guilty to an indictment charging concealment of assets from a trustee in bankruptcy. The court there determined that such a

crime involved moral turpitude, since the alien had invoked the aid of the bankruptcy law and had then violated the duty which the law imposed upon him—that of scheduling and delivering to the trustee in bankruptcy all of his assets, and said:

> "Confessedly, he withheld and concealed assets which he knew belonged to the trustee for distribution to his creditors. This was done contrary to honesty and good morals and was shameful wickedness on his part and thus involved moral turpitude."

Whatever change might have occurred in the moral viewpoint of society since the year 1917, as suggested by appellant in his brief (Points V and VI, pages 9 and 10), it would seem to be clear from the foregoing cases that the courts at least are in accord on the proposition that acts committed with a wicked, vicious or fraudulent intent are still contrary to the accepted and customary rule of right and duty between man and man.

The cases of *Robinson v. Day,* and *Portada v. Day,* supra, likewise rest the determination of the moral character of a crime upon the intent with which its commission was accompanied. The facts in those cases will be more fully discussed, however, by way of showing the specific application of the rule of intent to crimes of forgery and issuance of checks without funds.

III.

The crime of burglary in the second degree in Idaho in 1917 included, as an essential element there-

of, an intent to commit larceny or some felony and is thus a crime involving moral turpitude.

We do not dispute appellant's contention that the courts in determining whether or not a crime involves moral turpitude must look only to the inherent nature of the crime or to the facts charged in the indictment (pages 6 and 7, appellant's brief). We accordingly invite this court's attention to Section 8400, Idaho Comp. Stat., 1919, and Section 8401, Idaho Comp. Stat. 1919, defining the crime of burglary in the second degree as follows:

> "Sec. 8400: Every person who enters any house, room, apartment, tenement, ship, warehouse, store, mill, barn, stable, outhouse, or other building, tent, vessel, or railroad car, with intent to commit grand or petit larceny or any felony, is guilty of burglary.
>
> "Sec. 8401: Every burglary committed in the nighttime is burglary in the first degree and every burglary committed in the daytime is burglary in the second degree."

It will be noted that the statute defining the crime of burglary in the second degree requires, as an essential element thereof, a larcenous or felonious intent. Appellant has not considered the moral character of the crime of burglary in his brief, has offered no argument on that particular offense, and has mentioned it only to point out that the petition alleges appellant had received a pardon from the State of Idaho for that crime (Appellant's brief, p. 8). The record does not contain evidence of such a pardon having been received by the appellant, however,

and we do not concede that such is the fact. On the contrary, the stipulation of counsel recites as one of the issues of law herein to be determined the crime of burglary in the second degree in the State of Idaho in 1917 (Tr. p. 35).

In addition to its inclusion in the class of cases clearly involving moral turpitude as found in 43 Harvard Law Review, 119, and its use by way of illustration as a crime contrary to honesty and therefore one involving moral turpitude in the *Opinion of the Solicitor of the Department of Labor, supra,* we call the court's attention to the case of *United States ex rel Griffo v. McCandless, supra,* wherein the court said:

> "This relator served a term of imprisonment of more than one year for burglary. He would be in consequence clearly within the Act (Immigration Act), except for the further provision that the crime must have been committed 'within five years' after the alien came to this country. * * * whether the commission of the act of aggravated assault and battery carries with it the conviction, also, of moral depravity. Burglary undoubtedly does. Assault and battery may or may not. It is easily conceivable that the law may condemn it when the judgment of good men may unhesitatingly excuse, or sometimes, applaud it. * * *"

We have nowhere found any authority to the contrary, and we therefore submit that burglary as defined in the Idaho statute is a crime involving moral turpitude.

IV.

The crimes of knowingly uttering a forged check in the State of Oregon in 1919 and forgery of endorsement in Oregon in 1921 included, as an essential element thereof, an intent to defraud and are thus crimes which involve moral turpitude.

The inherent nature of the crimes of knowingly uttering a forged check and forgery of endorsement is ascertained by an examination of *Section* 14-379, *Oregon Code Annotated,* 1930, *supra.* Both of these crimes, by the Oregon statute, include the specific intent to injure or defraud. The statute as herein set forth has been the law of Oregon, unchanged by amendment since the year 1907. It is the appellee's contention that these crimes on their face involve moral turpitude, since the intention to injure or defraud manifests a depraved mind and is contrary to honesty, justice, principle and good morals.

The case of *Portada v. Day, supra,* is conclusive authority for this position. There the crime involved was the issuance of a check without funds with intent to defraud. The facts briefly were these:

The relator was an alien who was engaged in the fruit business in New York City. In 1924 he went to California to purchase some fruit, and in payment for a quantity of fruit he gave his check for $100 to a commission merchant. Later the payee of the check called the relator on the telephone and advised him that the $100 check had been lost and that he desired another one. Acting on this representa-

tion of the payee of the original check, the relator drew a second check for $100 to the same payee, who attempted to cash it, but was unable to do so because the bank informed him there were insufficient funds to cover the same, the shortage being approximately $7.50. Thereafter the relator was arrested and was wrongfully advised by one whom he retained as his attorney, but who apparently was not a lawyer, to plead guilty and that he would be lightly dealt with. The relator did plead guilty and, as a result of his plea, was sentenced to from one to four years in San Quentin.

The statute of California to which the relator pleaded guilty, so far as here material, read:

> "Every person who wilfully, *with intent to defraud,* makes or draws * *." (Italics ours.)

Thereafter the relator was arrested on a warrant issued by the Secretary of Labor for his deportation, charging commission of a crime involving moral turpitude within five years after entry. On a habeas corpus hearing the court dismissed the writ and remanded the relator to custody of the Commissioner of Immigration, stating, after referring to so much of the statute as is here quoted:

> "The difficulty in the case at bar, however, is the relator has pleaded guilty to a *willful intention to defraud.* The first part of Section 476 (a), under which he pleaded, reads as follows: 'Every person who wilfully, with intent to defraud, makes or draws * * *.' This court is bound by the record, and it is not open to question that such an act is one involving moral turpitude." (Italics ours.)

The court also distinguished this from other cases cited by counsel on the hearing, on the ground that the other cases turned upon the question of whether the act charged against the person carried with it a vicious intent or moral depravity and that the mere having of narcotics or a pistol in one's possession, etc., "did not necessarily indicate moral turpitude, because the *intention* of committing an act of baseness or viciousness was absent or unproven."

The case of *Nishomoto v. Nagle, supra,* decided by this court, also involved the crime of issuance of checks with intent to defraud. It was not there contended by the alien, however, that the offense did not involve moral turpitude, the sole question being whether conviction and sentence on five counts of an indictment, to run concurrently, were within the requirements of the Immigration Act that the alien be "sentenced more than once." The fact that it was not contended in that case that such an offense does not involve moral turpitude is very convincing that the contrary is true and that the moral guilt of the offender in such a case is too widely and generally accepted to be otherwise seriously urged before a court of record.

It is difficult to distinguish between the moral character of such a crime and the crime of knowingly uttering forged checks with intent to defraud. The intent and objective of the wrongdoer are identical, the only difference being in the details of the scheme by which it is sought to accomplish the fraudulent end.

There remains for consideration only the crime of forgery of endorsement in Oregon in 1921. This crime is defined also by *Section* 14-379, *Oregon Code, Annotated* 1930, and as judicially defined in *State v. Wheeler, supra,* a leading Oregon case, include, as essential elements: (1) a false making of some instrument in writing; (2) *a fraudulent intent;* (3) an instrument apparently capable of effecting the fraud." The crime of forgery, as defined by the Oregon statute, was known to the common law as an infamous crime, involving, as it did, the element of fraudulent intent. 2 Wharton's Criminal Law (3d ed.) Section 860.

The *Solicitor of the Department of Labor,* in his opinion, *supra,* includes forgery as a crime involving moral turpitude in that it is contrary to veracity and is thus classed with the crime of perjury.

In the case of *Volpe v. Smith, supra,* the Supreme Court of the United States determined that counterfeiting plainly involved moral turpitude. Forgery fundamentally would seem to be akin to counterfeiting, since both offenses are designed to cheat and defraud, to obtain money by the use of false pretenses, and by the use of false tokens, and while there seems to be no reported case in which the Supreme Court has been called upon to determine directly that forgery involves moral turpitude, its similarity to the crime of counterfeiting seems to bring it within the Supreme Court's holding in *Volpe v. Smith.*

In *Ex Parte Wilson, supra,* the Supreme Court again determined that passing counterfeit securities was an infamous crime in which the accused was entitled to be tried only on presentment or indictment by Grand Jury. In discussing the origin and meaning of the term "infamous", the court referred to the class of infamous crimes, conviction for which disqualified one from testifying, and there included forgery with arson, treason and "crimes injuriously affecting by falsehood and fraud the administration of justice, such as perjury, subornation of perjury, suppression of testimony by bribery * * * etc." Thus it is seen that forgery has long been classed as an infamous crime reflecting discreditably upon the moral character of the offender, and particularly his veracity.

Such being its origin, and present character it clearly is contrary to honesty, justice, principle and good morals, and violative of the customary and accepted rule of right and duty between man and man.

The case of *Robinson v. Day, supra,* is a case squarely in point, wherein the Circuit Court of Appeals for the Second Circuit was asked to decide whether an alien who had been convicted by a plea of guilty on an indictment charging forgery in the third degree in New York, but whose sentence had been suspended, was deportable under the terms of the Immigration Act. Circuit Judge Hand delivered the opinion of the court, and on this point said:

> "Forgery in all its degrees, as defined by the Penal Code of New York (Penal Law 2, Sec. 880, et seq.)

> *involves an intent to defraud and is thus a crime of moral turpitude.* Neither the immigration officials nor we may consider the circumstances under which the crime was, in fact, committed. When, by its definition, it does not necessarily involve moral turpitude, the alien cannot be deported because in a particular instance his conduct was immoral (citing cases). Conversely, when it does no evidence is competent that he was, in fact, blameless." (Italics ours.)

The relator in that case was discharged, but on the ground that a suspended or unexecuted sentence did not bring an alien within the meaning of the phrase "sentenced to imprisonment for a term of one year or more."

We find no authority, and appellant cites none, for his proposition that the Circuit Court of Appeals should take judicial notice of the fact that municipal judges daily dispose of such crimes as forgery and knowingly uttering forged checks as check vagrancy cases, and they are not, therefore, crimes involving moral turpitude. (Appellant's brief, p. 10, Point VI). We assume that the check cases brought into the municipal courts are disposed of in accordance with the respective city ordinances defining the crimes for which the arrests are made. Whether they do or do not involve moral turpitude would necessarily have to be determined by considering the provisions of the applicable ordinances, and "gravity of punishment is not controlling." (Appellant's brief, p. 6, and authorities there cited).

CONCLUSION

We wish briefly to comment on the cases of *Ex Parte Saraceno,* 182 F. 955, and *Ex Parte Edmead,* 27 F. (2d) 438; also *Fong Lue Ting v. United States,* 149 U. S. 759, which appellant has submitted to this court for its serious consideration.

In the Sarceno case it is merely determined that conviction of the crime of carrying a concealed weapon is not an act involving moral turpitude. We agree with such conclusion. It is not an act manifesting a depraved mind, nor does it involve a specific felonious intent. It is not contrary to honesty, justice or good morals, nor a violation of the customary rule of right and duty between man and man. There is nothing inherently immoral in carrying a concealed weapon. In fact, the right to keep and bear arms, as said by the court in the Saraceno case, is guaranteed by the Constitution of the United States and is an act which the State of New York may in its discretion, and frequently does, license and thus legalize.

The court therefore held that the mere failure to obtain a license, in compliance with the State's regulations, in order to carry a concealed weapon did not involve moral turpitude. We think such a crime is too obviously of a different class than the crimes for which the appellant here has been convicted to require further discussion.

In the Edmead case it was determined by the District Court that petit larceny did not involve moral turpitude.

Upon appeal, however, the Circuit Court of Appeals *(Tillinghast, Immigration Commissioner v. Edmead,* 31 F. (2d) 81) reversed the District Court and held that larceny, either grand or petit, was contrary to honesty and good morals and therefore involved moral turpitude. We accept the doctrine there enunciated unquestionably as the true rule of law and find nothing in that case which is in any way inconsistent with the position which we have taken in the instant case.

The dissenting opinion of Mr. Justice Fields in the case of *Fong Lue Ting v. United States,* 149 U. S. 759, to which appellant refers, is likewise not inconsistent with our position in the instant case. We recognize that the enforcement of the Immigration Act might, and undoubtedly does, in some cases work hardships on certain aliens. We call the court's attention, however, to the following exceptions in the Immigration Act:

> "* * * provision of this section respecting the deportation of aliens convicted of a crime involving moral turpitude shall not apply to one who has been pardoned, nor shall such deportation be made or directed if the court, or judge thereof, sentencing such alien for such crime shall, at the time of imposing judgment or passing sentence * * *, make a recommendation to the Secretary of Labor that such alien shall not be deported in pursuance of this subchapter. * * *"

The Congress has taken into consideration the harshness which might result from a strict enforcement of the

law, regardless of mitigating circumstances, and has vested in the various pardoning authorities, as well as the courts passing sentence, after conviction of aliens for crimes involving moral turpitude, the power to avoid the provisions of this Act, where the circumstances in a given case would seem to warrant leniency.

It would appear, therefore, that if the facts and circumstances surrounding the commission of the crimes for which appellant has been convicted are such as to merit leniency, application therefor should not be made to the federal courts by writ of habeas corpus, but directly to the Governor or the pardoning authorities in the States of Idaho and Oregon, before whom all mitigating circumstances might properly be urged.

Where, however, no pardon is granted nor recommendation made by the judge who imposed sentence, it is mandatory upon the Secretary of Labor to order the deportation, and if due process of law has been had the Secretary's decision thereon is final. As was said in the Portada case, in which there appeared to be many mitigating circumstances:

> "Although the result is harsh and unjust, I must, for I have no power to do otherwise, dismiss the writ and remand the relator to the custody of the Commissioner of Immigration."

And in the case of *United States v. Warden, Eastern State Penitentiary, supra,* in which the alien, who had been a resident of the United States since shortly after his birth

and who had been convicted of offenses involving moral turpitude, was refused a writ of habeas corpus, the court said:

> "The provisions of the Immigration Law must necessarily and unavoidably result in individual hardship in some cases. The law itself, however, is one which everyone must recognize as necessary protection for the people, and the particular hardship must be accepted as part of the cost of the general good."

We believe, therefore, that the order of the District Court denying the petition for writ of habeas corpus and remanding the petitioner to the custody of the immigration authorities should be affirmed.

Respectfully submitted,

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